

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 30 November 2016

BALCA No.: 2012-PER-01232

ETA No.: A-09280-67960

In the Matter of:

MSA PARTNERS, LLC,

Employer,

on behalf of

ICHIKAWA, ASUKA,

Alien.

Appearances: C. Steven Horn, Esquire
C. Steven Horn & Associates, P.C.
New York, New York
For the Employer

Jeffrey L. Nesvet, Associate Solicitor
Vincent C. Costantino, Senior Trial Attorney
Office of the Solicitor
Division of Employment and Training Legal Services
For the Certifying Officer

Mark Robert Barr, Esquire
Lichter Immigration
Denver, Colorado
For the Amicus Curiae, American Immigration Lawyers Association

Before the Board Sitting En Banc:

Stephen R. Henley, *Chief Administrative Law Judge*; Colleen A. Geraghty and Lee J. Romero, Jr., *District Chief Administrative Law Judges*; Paul R. Almanza, Jonathan C. Calianos, Clement J. Kennington, Monica F. Markley, Larry S. Merck, and Patrick Rosenow, *Administrative Law Judges*

DECISION AND ORDER, EN BANC
AFFIRMING DENIAL OF CERTIFICATION

PER CURIAM. This matter arises under § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and the “PERM” regulations¹ found at 20 C.F.R. Part 656.

BACKGROUND

On October 16, 2009, the Employer filed an *Application for Permanent Employment Certification* (“ETA Form 9089”) sponsoring the Alien for permanent employment in the United States in the position of “Survey Researcher.” (AF 36-45).² The Certifying Officer (“CO”) denied the application on April 14, 2010 on the ground that the Form 9089 did not show that the Alien met the job requirements prior to hire. Particularly, the Alien did not satisfy either the principal requirement of a Master’s degree or the alternative requirement of Bachelor’s degree and five years’ experience. (AF 34-35).

On May 11, 2010, the Employer filed an “Appeal Based on Department Error,” arguing that the CO misconstrued the job requirements reported on the Form 9089. (AF 18).

By letter dated November 29, 2011, the CO issued an Audit Notification. The CO set a deadline for response of December 29, 2011. (AF 14-17). On January 11, 2012, the CO issued a denial based on the failure to submit a timely audit response. (AF 11-13).

On February 2, 2012, the Employer requested review/reconsideration. (AF 2-10). The Employer attached a December 22, 2011 email the Employer’s attorney had sent to the PERM email box. In the email, the Employer’s attorney said that the Audit Notification had been received and that she believed it had been issued by mistake because the application had been denied and the Employer had requested review in May 2010. In this email, the attorney asked for a status update. (AF 9). There is no indication in the Appeal File whether the CO responded to this email.

On February 13, 2012, the CO affirmed the denial on reconsideration. The CO acknowledged the Employer’s argument that the Audit Notification was sent in error, but without actually addressing the question of whether the Audit Notification was issued in mistake, affirmed the denial. The CO then forwarded an Appeal File to the Board of Alien Labor Certification Appeals (“Board”). (AF 1).

On March 10, 2016, a three judge panel of the Board issued a “Decision and Order Affirming Denial of Certification” on the ground that the Employer failed to respond to the CO’s Audit Notification letter in violation of 20 C.F.R. §§ 656.20(a)(3), 656.20(b) and 656.24.

¹ “PERM” is an acronym for the “Program Electronic Review Management” system established by the regulations that went into effect on March 28, 2005.

² In this Order, AF is an abbreviation for Appeal File.

On March 30, 2016, the Board received the Employer's *pro se* Petition for En Banc Review, filed by its Managing Member, Christopher Vickrey. Mr. Vickrey stated that the Employer's attorney had believed that the original ground for denial had been an error because the Alien's qualifications were clearly listed on the Form 9089, and that the Audit Notification had been issued by mistake because the Employer never received a response from the CO to its original "Request for Reconsideration." (Employer's Petition at 2). Mr. Vickrey stated that "although we are not in a position to know one way or the other, it now appears to me that the audit notification, itself, may have been a response to our Request for Reconsideration. Whether or not it was, it seems clear that it was in our best interest for our lawyer to respond to the audit, and he did not." *Id.* Mr. Vickrey requested that the Board consider its initial "Request for Review for the first denial, as according to our lawyer, it was based on a simple and obvious government error." *Id.*

On May 19, 2016, the Board issued an order granting en banc review and requesting the parties to address whether, under the facts of this case, the CO properly issued an Audit Notification rather than forwarding an Appeal File to this Board either directly, or after reconsideration of the original ground for the denial. The Order further noted that "should the Board find that the Employer's 'Appeal' removed jurisdiction from the CO to issue an Audit Notification, the Board may address the original ground for denial, i.e., whether the Form 9089 showed that the Alien was qualified for the position when hired by the Employer."

On July 5, 2016, Counsel for the CO wrote the Board stating that the CO would not contest the vacating of the panel decision and agreeing that the Board could consider the viability of the original denial ground. The CO's letter did not address the merits of the denial. On August 23, 2016, the Employer filed an unopposed motion to file its brief out of time. We grant that motion. That brief is focused on the CO's jurisdiction. In regard to the Alien's qualifications at the time he was hired, the Employer stated only that "[a] review of the application demonstrates the beneficiary qualifies for the job opportunity." (Employer's En Banc Brief at 6). Similarly, the Amicus Curiae filed a brief which is exclusively directed to the issue of the CO's jurisdiction.

DISCUSSION

The CO's response to the Board's order granting en banc review was effectively a concession that the CO should not have issued an audit notification after the Employer requested Board review of the denial. Accordingly, the sole issue remaining in this matter is the CO's finding in his April 14, 2010 denial that the Form 9089 did not show that the Alien was qualified for the position under either the primary or the alternative job requirements.

The regulation at 20 C.F.R. § 656.17(i)(1) provides that "[t]he job requirements, as described [on the Form 9089], must represent the employer's actual minimum requirements for the job opportunity."

The purpose of this regulation "is to address the situation of an employer requiring more stringent qualifications of a U.S. worker than it requires of the alien; the employer is not allowed to treat the alien more favorably than it would a U.S. worker." *Your Employment Service Inc.*, 2009-PER-00151 (Oct. 30, 2009) (citing the pre-PERM decision in *ERF Inc.*, 1989-INA-00105

(Feb. 14, 1990)). In this case, the application provides for alternative requirements of a Master's Degree and no experience or a Bachelor's degree and five years of experience. (AF 37-38). The Alien possesses only a Bachelor's degree. The application form, however, indicates that the Alien possessed only two years of experience in market research prior to hire by the Employer. It describes an additional four years of experience gained while working for this Employer as a technical writer and translator. (AF 41-42).

The Employer's appeal letter does not address how this experience satisfies the requirements set forth in the application.³ The Employer wrote:

In the Denial, the Service^[4] has confused required work experience in the position offered in H.6 of the ETA 9089 with the required education in H.8. As discussed below, the denial is thus plain government error.

The sole reason give [sic] for the denial is that section H.6. of the ETA 9089 states that no experience in the position is required, but section H.8. states a possible alternative to the master's degree education requirement of a bachelor's degree + 5 years of experience. The Service incorrectly concluded that there is conflict in these sections. In fact, these sections plainly state separate and unrelated requirements.

The first section (H.6.) refers to experience required in the job offered, the second refers to required education. Additionally, H.8. only refers to an alternative to the master's degree requirement. Specifically, under 8 CFR 204.5(k)(2), a United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. Finally, we note that H.6 references required work experience in the job offered and H.8 only allows (not requires) work experience in the specialty (not the job offered). H.8. therefore does not require any work experience.

(AF 18) (emphasis as in original).

The Employer's suggestion that the CO's decision is based on a determination that the Employer's responses to items H. 6 and H. 8 are in "conflict," demonstrates a misunderstanding of the ground for the denial. The regulations require that primary and alternative requirements must be substantially equivalent. 20 C.F.R. § 656.17(h)(3). The CO, however, did not rely on that regulation to deny this application. Rather, the issue raised by the CO was that the Form 9089 did not show that the Alien qualified under either the primary or the alternative requirements, and therefore the Employer did not describe the actual minimum requirements for the job opportunity on the Form 9089 as required by 20 C.F.R. § 656.17(i)(1). The Employer's reconsideration request does not address how the Alien's experience prior to being hired by the

³ Because the experience gained with the Employer does not qualify the Alien for the position, we need not address whether such experience falls within the two exceptions that allow employers to rely upon experience gained by the alien with the employer seeking certification. 20 C.F.R. § 656.17 (i)(3).

⁴ We assume the Employer means the CO.

Employer qualified him for a position as a market researcher under the job requirements listed in the Form 9089. Since the Employer failed to demonstrate that the Alien qualifies for the position, we affirm the CO's finding that the Form 9089 did not describe the actual minimum requirements for the job opportunity, and affirm the denial of the application.

ORDER

Based on the foregoing, **IT IS ORDERED** that the Certifying Officer's **DENIAL** of labor certification in the above-captioned matter is **AFFIRMED**.

Entered at the direction of the Board by:

Todd R. Smyth
Secretary to the Board of Alien Labor
Certification Appeals